

ST 02-0031-PLR 12/19/2002 LOCAL TAXES

The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred. See 86 Ill. Adm. Code 270.115. (This is a PLR).

December 19, 2002

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see www.revenue.state.il.us/Laws/regs/part1200/), is in response to your letter of November 8, 2002. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to AAA for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither AAA nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

AAA respectfully requests that the Illinois Department of Revenue issue a private letter ruling confirming the requester's views regarding two issues which arise in applying Illinois Retailers' Occupation Tax and Use Tax to a particular fact situation. This Request is submitted on behalf of the requester by its representative FIRM under the authority conferred by a power of attorney on Form IL-2848, which is attached as Exhibit A.

Statement of Material Facts ST 02-0030-PLR 12/17/2002

Retail Seller was formed in 2001 by General Partner, as general partner with a one percent interest, and Limited Partner, as limited partner with a 99% interest. Limited Partner owns the entire member interest in General Partner.¹ Retail Seller was formed to purchase Equipment from Wholesale Transaction Vendors and, in Illinois, to resell such Equipment to the Illinois Operating Companies.² Retail Seller's principal place of business is located outside the State of Illinois and Retail Seller does not currently have a sales office or sales acceptance facility in Illinois. Most corporate functions of Retail Seller, including legal, regulatory compliance, accounting, tax, retail operations, facility management, etc. are performed by employees of Limited Partner or its affiliates. In addition, certain tax and accounting functions are performed by Retail Seller's Agent under the Agency Agreement.

Current procedure for Equipment purchase transactions.

Equipment purchase transactions, each consisting of a Wholesale Transaction (from a Wholesale Transaction Vendor, as seller, to the Retail Seller, as purchaser) followed by a resale transaction (from the Retail Seller, as seller, to an Operating Company, as purchaser), currently occur through Retail Seller as follows:

An Engineer identifies a need for a particular item of Equipment, defines the technical specifications for the Equipment, and identifies the Wholesale Transaction Vendor that can supply Equipment with those specifications.

To notify the Retail Seller and the Operating Company of the Operating Company's need for particular equipment, the Engineer enters an equipment requisition into the purchasing system owned and maintained by Limited Partner for the benefit of itself, the other Operating Companies and Retail Seller. Retail Seller produces a Wholesale P.O. to the applicable Wholesale Transaction Vendor. This Wholesale P.O. identifies the Retail Seller as the purchaser, which Operating Company requested the Equipment, and the Equipment Site to which the Equipment is to be drop shipped by Wholesale Transaction Vendor. Because Retail Seller has issued each Wholesale Transaction Vendor a resale exemption certificate with respect to each applicable state taxing jurisdiction, the Wholesale P.O. does not include state or local sales tax or use tax (*i.e.*, with respect to Illinois deliveries, the Wholesale P.O. does not include state or local Retailers' Occupation Tax or Use Tax).

On behalf of Retail Seller, the Engineer prints this Wholesale P.O. and faxes it to Wholesale Transaction Vendor for processing. Wholesale Transaction Vendor then, as specified on the Wholesale P.O., either (i) drop ships the Equipment to the Equipment Site or to an Operating Company warehouse, or (ii) stores the Equipment at a Wholesale Transaction Vendor warehouse for future delivery to the Equipment Site.

Following delivery by Wholesale Transaction Vendor, Retail Seller resells the Equipment to the Operating Company. This resale occurs at the time the Equipment is placed in service at the Equipment Site or, if the Operating Company is not wholly owned by Limited Partner and its wholly owned subsidiaries, immediately following the time Retail Seller takes legal title to the Equipment from Wholesale Transaction Vendor.

Wholesale Transaction Vendor invoices Retail Seller for payment of the Equipment purchase price. Limited Partner, on behalf of Retail Seller, remits payment of the invoice to Wholesale Transaction Vendor through the accounts payable system owned and maintained by Limited Partner, using funds from Limited Partner's bank account. In order to reflect this funding, and the funding of the subsequent resale of the Equipment to the Operating Company, the following items are reflected on a monthly basis on the books of Retail Seller, General Partner, Limited Partner and the other Operating Companies:

Retail Seller books an inter-company payable due to Limited Partner in the aggregate amount of Equipment-purchase payments made during the month to

Wholesale Transaction Vendors from Limited Partner's bank account (which is referred to here as the 'Retail Seller Payable').

Retail Seller books an inter-company receivable due from all Operating Companies in the aggregate amount of the price of Equipment resold by Retail Seller to the Operating Companies during the month (the aggregate of such receivables from all Operating Companies is referred to here as the 'Retail Seller Receivable').

The Retail Seller Payable for the month is netted against the Retail Seller Receivable for the month. If this results in a net payable, then the books of Retail Seller are adjusted (*i.e.*, the net payable is extinguished) by executing an equity contribution to Retail Seller from General Partner and from Limited Partner, each in an amount equal to the product of (i) the amount of the net payable and (ii) the percentage of its partnership interest in Retail Seller. If this results in a net receivable, then the books of Retail Seller are adjusted (*i.e.*, the net receivable is extinguished) by executing a distribution from Retail Seller to General Partner and to Limited Partner, each in an amount equal to the product of (i) the amount of the net receivable and (ii) the percentage of its partnership interest in Retail Seller.

New procedure for Equipment purchase transactions.

The new procedure for Equipment purchase transactions, involving Retail Seller's Agent, will be initiated by the execution and delivery by the parties thereto of the Sale Agreement and the Agency Agreement. The primary purpose of Retail Seller and the Operating Companies for changing from the current procedure to the new procedure is to ensure that, when Equipment is sold to Illinois Operating Companies, such sale occurs in either City A or City B for purposes of Retailers' Occupation Tax. The material terms of these agreements are incorporated in the description of the proposed new procedure below. Under these agreements, there is no transfer of title to Equipment to an Illinois Operating Company, no obligation binding Retail Seller to sell Equipment, and no obligation binding the Illinois Operating Company to purchase Equipment unless and until a complete and unconditional offer to sell Equipment is made by Retail Seller's Agent and such offer is accepted without modification by the Illinois Operating Company within the time frame established in the offer and such acceptance is made by the authorized means of acceptance established in the Sale Agreement.

Retail Seller's Agent is not affiliated with Retail Seller, General Partner or the Operating Companies (meaning that there is no common ownership). Retail Seller's Agent maintains offices, staffed by employees of Retail Seller's Agent, in Illinois in City A and City B, and outside Illinois in City C.

The new procedure for effecting Equipment purchase transactions, each consisting of a Wholesale Transaction (from a Wholesale Transaction Vendor, as seller, to the Retail Seller, as purchaser) followed by a resale transaction (from the Retail Seller, as seller, to an Operating Company, as purchaser), adds the following new steps to the current procedure described above:

After printing the Wholesale P.O., on behalf of Retail Seller the Engineer will fax a copy to both the Wholesale Transaction Vendor and the Retail Seller's Agent at

its City C office outside Illinois. Pursuant to the Agency Agreement, Retail Seller's Agent is required to determine whether the Equipment Site described in the Retail Seller purchase order is within a state where the new procedure applies.³

If the Equipment Site is within a state where the new procedure applies, Retail Seller's Agent is required to generate, from its City C office, a complete and unconditional offer to sell document (sometimes referred to here as an 'Offer'), which includes as an exhibit an attached copy of the Wholesale P.O. The terms of the Offers made by Retail Seller's Agent to the Operating Company are that (i) Retail Seller offers to sell the Equipment described in the attached Wholesale P.O. to the Operating Company at Retail Seller's cost plus applicable taxes and shipping charges, (ii) Retail Seller's offer is complete and unconditional but may only be accepted by the Operating Company's without modification and by precisely following the authorized method of acceptance as defined in the Offer and the Sale Agreement.

The authorized means of acceptance of Retail Seller's complete and unconditional Offer to sell the Equipment to the Operating Company is strictly limited to the Operating Company delivering evidence of acceptance of the Offer to the office of Retail Seller's Agent in City A or City B, as specified in the Offer within the time frame established by Retail Seller in its offer.

We note that the Sale Agreement and the Retail Seller's Offers to sell particular Equipment made thereunder explicitly restrict the means by which the Operating Company's may accept the Retail Seller's unconditional offers to sell Equipment. Any attempted acceptance of an Offer that does not comply with these strict procedures is legally invalid as an acceptance of the Offer, voids the original Offer of Retail Seller and will be treated by the Retail Seller as an invitation to make a bid for the sale of the Equipment.

We also note that the Sale Agreement and the Retail Seller's Offers to sell particular Equipment made thereunder explicitly state that following acts shall not 1) constitute the making of an offer to sell or purchase Equipment, 2) constitute the acceptance of an offer to sell or purchase Equipment, 3) serve to transfer title or risk of loss of Equipment, 4) obligate or bind in any way Retail Seller to the sale of Equipment to the Operating Company, or 5) obligate or bind in any way the Operating Company to the purchase of Equipment from Retail Seller or from the Wholesale Transaction Vendor:

- i) the input of a requisition into the purchasing system;
- ii) the issuance of a Wholesale P.O. to a Wholesale Transaction Vendor or to Retail Seller's Agent;
- iii) the acceptance of the Wholesale P.O. by the Wholesale Transaction Vendor (which does bind the Retail Seller to the wholesale purchase of Equipment);
- iv) the shipment of Equipment by a Wholesale Transaction Vendor to a warehouse or to an Equipment Site;
- v) the transfer of possession of Equipment to an Operating Company;
- vi) any attempted acceptance of Retail Seller's unconditional offer that does not comply with the authorized means of acceptance; and

vii) any other act by any party.

Unless and until the Operating Company validly accepts the Retail Seller's complete and unconditional offer to sell Equipment by forwarding notification of acceptance without modification to Retail Seller's Agent within the time frame provided for acceptance, the Operating Company has no right or title to the Equipment. The Retail Seller retains full title to the Equipment and may freely remove the Equipment from the warehouse, the Equipment Site, or the possession of the Operating Company and may sell the Equipment to any party or otherwise dispose of the Equipment without incurring any obligation to the Operating Company.

If the delivery location identified in the purchase order is in City D, then Retail Seller's Agent is required to specify the office of Retail Seller's Agent in City B⁴ as the location for delivery of the acceptance of the Offer. If the delivery location is in Illinois and outside City D, then Retail Seller's Agent is required to specify the office of Retail Seller's Agent in City A as the location for delivery of acceptance of the Offer.

Retail Seller's Agent forwards the Retail Seller's complete and unconditional offer to sell Equipment to the authorized representative of the Operating Company for accepting such Offers. Pursuant to the Sale Agreement, the Operating Company is entitled to purchase the Equipment described in the purchase order, and enters into a binding contract to do so, only by accepting the Offer without modification and returning evidence of such acceptance to the Retail Seller's Agent at the location specified in the Offer.

Upon receiving evidence of acceptance, Retail Seller's Agent verifies that the acceptance was made without modification, that the evidence of acceptance was received at the correct location, that an authorized representative of the Operating Company affected the acceptance, and that the evidence of acceptance was received on or before the deadline. Upon verification by Retail Seller's Agent, the contract of sale becomes binding on Retail Seller and the Operating Company -- obligating the Retail Seller to transfer title to the Equipment and obligating the Operating Company to pay the agreed consideration.

As a supplement to the proposed new procedure described above, Retail Seller's Agent is also required under the Agency Agreement to issue monthly unconditional offers to sell Equipment which, by reason of administrative error or otherwise, was not captured by the regular procedure. The only difference between this supplemental procedure and the regular procedure is that the Offer will attach aggregate information derived from monthly reports instead of individual purchase order copies.

Issues

1. With respect to Equipment transferred initially from Wholesale Transaction Vendor to Retail Seller in a Wholesale Transaction as defined above, and then from Retail Seller to an Illinois Operating Company, under the new procedure as described above, for which evidence of the Illinois Operating Company's acceptance of Retail Seller's

complete and unconditional offer to sell the Equipment is received by Retail Seller's Agent in City A:

- a. Is Retail Seller subject to Retailers' Occupation Tax in City A imposed at the rate in effect in City A ?
- b. Is Retail Seller subject to Retailers' Occupation Tax in any taxing jurisdiction other than City A?
- c. Is Retail Seller subject to Use Tax in any taxing jurisdiction?
- d. Is the Illinois Operating Company subject to Use Tax in any taxing jurisdiction?

2. With respect to Equipment transferred initially from Wholesale Transaction Vendor to Retail Seller in a Wholesale Transaction as defined above, and then from Retail Seller to an Illinois Operating Company, under the new procedure as described above, for which evidence of the Illinois Operating Company's acceptance of the Retail Seller's complete and unconditional offer to sell the Equipment is received by Retail Seller's Agent in City B:

- a. Is Retail Seller subject to Retailers' Occupation Tax in City B imposed at the rate in effect in City B?
- b. Is Retail Seller subject to Retailers' Occupation Tax in any taxing jurisdiction other than City B?
- c. Is Retail Seller subject to Use Tax in any taxing jurisdiction?
- d. Is the Illinois Operating Company subject to Use Tax in any taxing jurisdiction?

Relevant Authorities

Recent letter rulings indicate that, in the Department's opinion, the imposition of the various sales tax related local taxes in Illinois are triggered when 'selling' occurs in a jurisdiction imposing a tax. For example, in PLR ST-01-0003, February 2, 2001, the Department opined that where a centralized purchasing company sold goods to the parent company, those sales were situated to the municipality in which the seller received the purchaser's signed sales agreement (the final act necessary to bind the seller to the sale).

86 Ill. Adm. Code 270.115 specifically provides, in part:

- b) Seller's Acceptance of Order
 - 1) Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If the purchase order is

accepted at the seller's place of business within the municipality or by someone who is working out of such place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (f) and (g) of this Section, or if a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the home rule municipality or by someone working out of such place of business, the seller incurs Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.

This regulation provides that upon the receipt of an order which is a purchaser's acceptance of a retailer's complete and unconditional offer to sell by someone working out of a place of business of the retailer in a home rule municipality, the retailer incurs Home Rule Municipal Retailers' Occupation Tax liability in that home rule municipality. We note also that the regulation refers not to an 'employee' working out of the seller's place of business, but rather to 'someone' working out of the seller's place of business. Based on this regulation, it seems to make no difference whether the receipt of the customer's acceptance is by the Retail Seller's Agent or by the Retail Seller's employee. (See ST 01-0034-PLR, August 13, 2001, which reaches the same conclusion).

Conclusion

The facts indicate that Retail Seller makes complete and unconditional offers to sell Equipment to Illinois Operating Companies under the terms of a written Sale Agreement. Pursuant to the Sale Agreement and the individual Offers made thereunder, the Retail Seller is not obligated to sell the Equipment to the Illinois Operating Company (and may freely remove the Equipment from the warehouse or Illinois Equipment Site and dispose of the Equipment without any obligation to the Illinois Operating Company) unless and until the Illinois Operating Company accepts the Retail Seller's offer by following the authorized means of acceptance outlined in the Sale Agreement and the offer. The facts further indicate that the authorized means of acceptance is strictly limited to acceptance without modification by an authorized representative of the Illinois Operating Company, and the transmission of evidence of the acceptance to the Retail Seller's Agent location specified in the Offer as City A or City B within the time frame provided in the Offer.

Therefore, our view is that, with respect to Equipment described in an Offer for which notice of acceptance is received by Retail Seller's Agent in City A, Retail Seller is only subject to Retailers' Occupation Tax in City A imposed at the rate in effect in City A, and neither Retail Seller nor the Illinois Operating Company is subject to Use Tax in any taxing jurisdiction. Likewise, our view is that, with respect to Equipment described in an Offer for which notice of acceptance is received by Retail Seller's Agent in City B, Retail Seller is only subject to Retailers' Occupation Tax in City B imposed at the rate in effect in City B, and neither Retail Seller nor the Illinois Operating Company is subject to Use Tax in any taxing jurisdiction.

Other than ST 02-0025-PLR (9/6/2002), we are unaware of any relevant authority which is contrary to our view.

Therefore, we respectfully request that the Department issue a private letter ruling confirming these conclusions.

Administrative Matters

As required by 2 Ill. Adm. Code 1200.110, Retail Seller states that:

None of the issues described in this Request are involved in the return of Retail Seller or any taxpayer related to Retail Seller for an earlier tax reporting period, which return either is being examined as part of a Department audit or is involved in pending litigation.

The Department has previously ruled on this issue for the Retail Seller (see ST 02-0025 9-6-2002). However, the original request was unclear as to certain critical factual matters. Therefore, this request is submitted to allow the Department to re-consider the issue based on a clearer statement of facts.

Pursuant to 2 Ill. Adm. Code 1200.110(c), Retail Seller requests that the following information included in this Request be deleted from your ruling prior to public dissemination: the definition of each defined term which is listed in the General Information section of this Request, and the name of Retail Seller's representative.

If any additional information is required, please contact #. If you contemplate issuing a response to this Request that does not grant the requested rulings, or contemplate issuing a response that is other than in the form of a binding private letter ruling, then we respectfully request the opportunity to meet with you prior to such issuance.

Please see the enclosed copy of Sec. 270.115 of the Home Rule Municipal Retailers' Occupation Tax for guidance concerning jurisdictional questions. In general, the imposition of the various sales tax related local taxes in Illinois are triggered when "selling" occurs in a jurisdiction imposing a tax. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred.

The tax rate is fixed by the location of the seller, not the delivery location. The fact that the item being sold is shipped from out-of-State or from another Illinois location is immaterial for purposes of local taxes if the sale occurs through order acceptance in an Illinois jurisdiction imposing a local tax. For these transactions the local tax will be incurred. Although 86 Ill. Adm. Code 270.115 deals with the municipal Home-Rule taxes, the principles outlined in this regulation apply to all local taxes administered by the Department.

If a purchase order is accepted outside the State, but the property being sold is located in an Illinois jurisdiction that has imposed a local tax (see, for example, Section 270.115(b)(3)), then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes.

In the first issue you present, the retail seller is subject to Retailers' Occupation Tax in City A imposed at the rate in effect in City A. In the second issue you present, the retail seller is subject to Retailers' Occupation Tax in City B imposed at the rate in effect in City B. This ruling is based upon third parties not installing the tangible personal property that is purchased.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.

¹ Although it does not appear to be relevant for purposes of this Request, we note for your information that both General Partner and Retail Seller are disregarded entities for purposes of both federal and Illinois income taxation.

² Outside Illinois, Retail Seller either leases or resells Equipment to Operating Companies.

³ Initially, the proposed new procedure will only apply to purchase orders for which the delivery location is within Illinois.

⁴ City B currently imposes a one percent (1%) Home Rule Municipal Retailers' Occupation Tax.